IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DORIS M. SOLSOL and YOLI SANDRA RODRIGUEZ DIAZ, Individually and on Behalf of All Others Similarly Situated,	)	
Plaintiffs,	)	No. 13 C 7652
v.	)	District Judge Robert W. Gettleman
SCRUB, INC., TERESA KAMINSKA, and MARK RATHKE,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION TO DECERTIFY THE COLLECTIVE ACTION

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Defendants, Scrub, Inc. ("Scrub"), Teresa Kaminska ("Kaminska"), and Mark Rathke ("Rathke"), by and through their attorneys, Francisco E. Connell, David J. Tecson, Ryan A. Haas and Daniel J. Fumagalli of Chuhak & Tecson, P.C., for their Memorandum in Support of their Motion to Decertify the Collective Action in this case, and in support hereof, state as follows:

I. INTRODUCTION

The two named Plaintiffs, Doris Solsol ("Solsol") and Yoli Rodriguez Diaz ("Rodriguez"), were employed by Scrub as janitors to work on the City of Chicago contract cleaning areas of O'Hare International Airport ("O'Hare") owned by the City. The work was performed under a collective bargaining agreement ("CBA") with the Service Employees International Union ("SEIU") to which Scrub was bound. Scrub ceased doing work on the City of Chicago contract on December 31, 2012. Neither Solsol nor Rodriguez have worked at Scrub since December 2012.

Scrub also employs janitors who work under contracts with the airlines to clean gates and jet bridges. Most of these employees are not members of a union and do not work under a CBA. In addition, Scrub employs certain cabin cleaners who are required to travel to the tarmac and clean the cabins of airplanes. Scrub has employees who clean in airplane hangars on the tarmac. Scrub also has employees who work in provisions stocking airplanes with supplies, not providing any janitorial services.

All of these various categories of employees perform varying jobs at different locations at O'Hare, with different supervisors, different training and different work practices. Some employees stated that they would gather supplies prior to the start of their scheduled shifts. Other employees would have supplies placed on a table before the shift or would obtain supplies from a truck on the tarmac after the start of the shift so that they did not need to spend pre-shift time gathering supplies. Many employees begin their shift with exercises. Others do not.

In addition to the variations in the work, the putative class varies widely in the claims for unpaid work. Some of the employees stated that they worked as much as 15 to 30 minutes before the start of the shift, while others claimed to have spent only a few minutes, still others may have punched in, but did not work at all before the start of the shift. Many of the employees claim to have worked at least part of their unpaid meal period every day, while others claim to have never been allowed a meal period, and others claim to have worked through lunch occasionally, while some would make up the time later in the shift. Additionally, some of the putative class members worked for Scrub for several years, some for a couple of months, others for less than a week. Janitors under the City of Chicago contract were paid a different rate than other employees, and cabin cleaners were paid a higher rate than other hourly employees.

Despite the clear differences in each of these categories of employees, type of work performed, and length of time they worked for Scrub, Plaintiffs seek to maintain the certification a collective action of all of these employees.[1]

Trial of this case will require individual testimony from approximately 769 opt-in plaintiffs[2] who worked in different departments for different lengths of time with different rates of pay who allegedly performed varying amounts of pre-shift or meal period work under supervisors with varying methods of recording time. The opt-in plaintiffs have provided widely

[1] On April 27, 2015, the Court conditionally certified a class in this case. (Doc. #339.) On January 22, 2016, Plaintiffs' counsel expressly waived their claims under Illinois law and withdrew their motion to certify a Rule 23 class. (Docket No. 444.) As a result, Defendants' Motion and Memorandum focus on decertification of the FLSA collective action only.

[2] Plaintiffs have filed approximately 820 opt-in consents, but approximately 51 of the opt-in consents are from individuals who Scrub has no record of employing or whose employment at Scrub ended prior to the beginning of the class period.

different statements about how much pre-shift time was worked, and whether, how often and how long they worked through the unpaid meal period, if at all. As such, individualized issues predominate over any alleged issues common to the putative class.

Furthermore, there is no common method the Court could employ to consider Defendants' Affirmative Defenses that claims of the Plaintiffs are *de minimis*, that Defendants are entitled to set-offs for overpayments made to certain of the opt-in Plaintiffs, and that Defendants acted in good faith. Each of the Affirmative Defenses must be applied to each individual claim.

Finally, procedural and fairness concerns weigh against this case proceeding as a collective action. There is no credible or reliable method of calculating damages. Plaintiffs failed to disclose any damages expert testimony, statistical analysis, or any reliable method to estimate damages on a class-wide basis. Every opt-in plaintiff must testify to his or her alleged uncompensated work time, his or her rate of pay, his or her tenure, and how much each Plaintiff claims. This failure by Plaintiffs undermines their ability to adequately prosecute this action as a collective action and further demonstrates the individualized inquiries the Court must make undermining a collective action. The necessity of conducting 769 mini-trials to determine each opt-in plaintiff's damages undermines the purpose of an FLSA collective action.

For all of these reasons, the Court should decertify the collective action, dismiss the opt-in plaintiffs, and this case should proceed with the two named Plaintiffs.

II. STATEMENT OF FACTS IN SUPPORT OF DECERTIFICATION

For efficiency's sake, Defendants incorporate as though fully set forth herein Defendants' Local Rule 56.1 Statement of Additional Facts in opposition to Summary Judgment.

A. Scrub's Diverse Hourly Employees at O'Hare

Defendant, Mark Rathke ("Rathke"), is employed as Scrub's General Manager ("GM"). (Rathke Deposition Transcript ,"Rathke Dep.," at p. 6; 7-11, Defendants' Exhibit 9.[3]) As GM, Rathke is responsible for negotiating Scrub's contracts for cleaning services. (*Id.* at p. 27.) Rathke described that Scrub provides a variety of services under contracts with different entities.

Between the beginning of the class period in October 2010 and December 31, 2012, Scrub provided cleaning services to the main quarters of the domestic terminals at O'Hare and the public restrooms under a contract with the City of Chicago (hereinafter "the City contract"). (Rathke Dep. at pp. 30-31, 60-61, Ex. 9.) The City contract ended on December 31, 2012 and was not renewed by the City. (*Id.*)

Scrub also provides cleaning services in the domestic gate areas under separate contracts with certain airlines. (Rathke Dep. at pp. 23-24, Ex. 9.) These contracts also include cleaning of jet bridges for certain airlines, and cleaning the lower level employee areas. (*Id.*) These also entail providing cleaning services for certain airlines in hangars, cargo and maintenance buildings, as well as administrative buildings. (*Id.*)

In Terminal 5, the international terminal at O'Hare, Scrub cleans certain exclusive spaces for domestic carriers located in theTerminal and for approximately two-thirds of the foreign carriers working out of Terminal 5. (*Id.* at p. 25: 20-21.) Scrub has separate contracts with each of the airlines. (*Id.* at p. 26: 11-14.)

Scrub also employs cabin cleaners who provide cleaning services inside airplane cabins on the tarmac or in airplane hangars, and security checks. The cabin cleaners have different training from other employees at Scrub, which consists of in-classroom training and taking exams. (*Id.* at pp. 85: 3 – 86: 24, p. 100: 2-20.) The cabin cleaners in the international terminals

[3] Unless otherwise noted, all citations are to Defendants' Exhibits, which have been filed with the Court.

must receive an additional security clearance not required of other employees. (*Id.;* Cynthia Garcia Deposition Transcript ("Garcia Dep.") at pp. 35-36, 52-53, 95, Defendants' Exhibit 1.) Cabin cleaners are paid a higher hourly rate than other Scrub janitors. (Exhibit B to Declaration of Sally Coady ("Coady Dec."), Defendants' Exhibit 14.)

Certain other Scrub employees work in the provisions department, which is a provisioning center for United Airlines and certain other carriers that entails loading trucks of supplies for aircraft. (Rathke Dep. at pp. 98-99, Ex. 9.) These employees do not perform any cleaning services. (*Id.*)

B. Solsol & Rodriguez – Janitors on the City Contract

Solsol was employed by Scrub as a janitor working under Scrub's contract with the City of Chicago. (Solsol Dep. at p. 79, Defendants' Exhibit 10.) The janitors who worked on the City of Chicago contract cleaned the main corridors of airport, the public restrooms and some of city-designated offices. (Rathke Dep. at pp. , 60-61, Ex. 9.) Solsol paid dues to a union but did not know whether she was a member of the SEIU. (Solsol Dep. at pp. 42: 21 -43: 4, Ex. 10.) Solsol would be assigned to clean bathrooms and/or floors in certain of the airport terminals. (*Id.* at pp. 100: 6 – 101: 12.) She would not clean the gate areas. (*Id.* at p. 105:9-19.) Other employees were assigned to clean the gate areas. (*Id.*) Solsol never cleaned inside airplane cabins for Scrub. (*Id.* at p. 117: 6-12.) Solsol was employed until December 2012 (*Id.* at p. 79.)

Rodriguez was also employed by Scrub as a janitor on the City contract and was a member of the SEIU. (Rodriguez Dep. at pp. 25-26, Defendants' Exhibit 11.) Rodriguez's job was to keep the bathrooms clean if she was assigned to bathrooms and it was to keep the floors clean if she was assigned to floors. (*Id.* at pp. 44-45.) Rodriguez never cleaned airplanes and stated: "I did not work, you know, with the airplanes, so I don't know anything about the airplanes." (*Id.* at p. 28: 10-11, p. 38: 8-9.) Rodriguez worked on the second shift, which was scheduled from 2:00 p.m. until 10:30 p.m., five days per week. (*Id.* at pp. 29, 31.) She would report to Scrub's Terminal 3 office in O'Hare for her shift each day. (*Id.* at p. 35: 2-10.) Rodriguez stated that Kaminska told her supervisor that the janitors were required to report to work no later than 1:30 p.m. (*Id.* at pp. 39-41.) Rodriguez was employed by Scrub until December 2012, when her employment was terminated along with all janitors on the City contract when the City did not renew the Scrub contract. (*Id.* at p. 27: 1-4.)

C. Variations in Supervisor Practices and Employee Work Practices

The supervisors for each of these categories of employees each had their own practices regarding pre-shift and meal period work. For example, Maria Rios ("Rios") was employed by Scrub as a supervisor of janitors under the City of Chicago contract. (Rios Declaration, Defendants' Exhibit 12.) Janitors under her supervision were not allowed to punch into the time prior to the 2:00 p.m. start of the shift. (*Id.* ¶ 3.) The janitors under Rios were not required to gather any supplies or perform any work before 2:00 p.m. (*Id.*) After they punched in at 2:00 p.m., the janitors would perform exercises led by Rios. (*Id.* ¶ 4.) All janitors under Rios received a full thirty (30) minute meal period. (*Id.* ¶ 6.) After the end of the City contract, Rios also supervised janitors on the second shift, who also were not required to perform any pre-shift work. (*Id.* ¶ 8.) These janitors may have had their meal period interrupted on occasion, but when this happened, the janitor would either be allowed another meal break later in the shift or would be paid for the time worked. (*Id.* ¶ 10.)

Another supervisor, Domingo Yoc ("Yoc"), who supervised janitors on the American Airlines second shift, stated that janitors under his supervision were not allowed to punch-in more than ten minutes before the start of the shift. (Yoc Declaration ¶ 4, Defendants' Exhibit 3.)

Janitors under Yoc were not required to perform any pre-shift work. (*Id.*) All janitors received a full thirty minute meal period per shift and on the rare occasion a meal period was interrupted, the janitors would be given another meal period later in the shift or would be paid for the time worked. (*Id.* ¶ 6.)

Cynthia Garcia ("Garcia") was employed by Scrub as a cabin cleaner and later became a cabin cleaner supervisor. Garcia stated that as a cabin cleaner, her supervisor gathered the cleaning supplies and placed them on a table in the break room for the start of the shift. (Garcia Dep. at p. 21: 9-20, Ex. 1.) After she became a supervisor, Garcia arrived early each day to gather supplies for the cabin cleaners and would hand out time cards ten minutes before the start of the shift. (*Id.* at p. 59: 6-19.) As a supervisor, Garcia would round time on the punch cards up or down to the nearest quarter hour when calculating time worked by cabin cleaners. (*Id.* at p. 82: 10-21.) If a cleaner's meal period was interrupted, Garcia would give the cleaner another meal period later in the shift. (*Id.* at p. 78: 1-7.)

Viktoria Nikolova ("Nikolova") supervised cabin cleaners on the overnight shift. (Nikolova Dep. at pp. 66: 19-23, 70: 7-16, and pp. 167: 18-168: 13, Defendants' Exhibit 5.) Her shift is the only one that performed deep cleaning on aircraft parked overnight at O'Hare. (*Id.* at p. 96: 2-4.) She had four crews of twenty cleaners each with a crew lead. (*Id.* at p. 96: 2-9.) Nikolova stated that during the course of every shift, the cabin cleaners under her supervision received forty to forty-five minutes to have their meal period. (*Id.* at pp. 118: 17 – 119: 12.) No cabin cleaner on the night shift under Nikolova ever had their meal period interrupted. (*Id.* at p. 175: 24 – 176: 10.) Nikolova never worked day shift, so she was not aware of whether the meal period was different during the day shift. (*Id.* at p. 176: 11-17.) Nikolova also rounded time on the punch cards to the nearest quarter hour when calculating time worked. (*Id.* at p. 182: 1-15.)

Maria Paniagua De Cortes ("Cortes") worked as a janitor for Scrub responsible for cleaning offices out of Hangar 5 at O'Hare. (Cortes Dep. at pp. 38: 12 – 39: 4, Defendants' Exhibit 13.) Unlike other janitors, Cortes took a shuttle bus from Terminal 2 to get to Hangar 5 each work day. (*Id.* at p. 39: 23 – 40: 8.) Cortes would then punch-in at provisions. (*Id.* at p. 61: 12-16.) Her shift was from 8:30 p.m. until 6:30 a.m. and could until 7:00 a.m. (*Id.* at p. 49: 19-23.) After punching in for the day, Cortes would go to the medical office to gather supplies in a janitor's closet and start cleaning for the day. (*Id.* at pp. 60-62.) Cortes did not perform any exercises while working in Hangar 5 because the supervisors were not there when she started her shift. (*Id.* at p. 55: 3-9.) Cortes had no scheduled lunch period. (*Id.* at p. 68: 17-20.) She would take ten to fifteen minutes to eat quickly. (*Id.*) Cortes stated that she never received a thirty-minute meal period while working in Hangar 5. (*Id.* at p. 74: 3-5.) Cortes also worked as a janitor in Terminal 1 where she received a full thirty minute meal period while working in Terminal 1. (*Id.* at p. 70: 10-13.) Cortes never worked in Terminal 3, the international terminal or in cabin cleaning. (*Id.* at p. 76: 13-24.)

Martha Arroyo ("Arroyo") was employed by Scrub as a day shift cabin cleaner out of various terminals at O'Hare. (Arroyo Dep. at pp. 24, 29-30, Defendants' Exhibit 8.) Part of her job duties involved performing security checks on airplanes, checking planes for knives, guns and other contraband. (*Id.* at pp. 31-32.) Arroyo claimed that she was told that she must arrive fifteen minutes before the start of her shift. (*Id.* at p. 62.) She stated it took her seven to ten minutes to collect supplies before the start of her shift. (*Id.* at p. 61.) After clocking-in for the shift and gathering supplies, Arroyo stated that she would relax and socialize with co-workers before the start of the shift. (*Id.* at pp. 63-64.) In 2012, her supervisor started requiring exercises at the start of the shift. (*Id.* at p. 85.) Arroyo stated that she was entitled to a thirty-minute meal period, and if that was interrupted, she would sometimes be allowed to go back and take the full thirty minute meal period. (*Id.* at pp. 111-112.) Arroyo also stated that at times she would receive less than a full thirty minutes for her meal period, and that this would happen twice per week. (*Id.* at p. 97.)

D. Individualized Issues Related to Alleged Damages

The opt-in Plaintiffs' claims to pre-shift work vary widely. Plaintiffs have filed hundreds of Declarations in this case, which demonstrate a wide variance in alleged uncompensated time work. Solsol and Rodriguez each claim to have been required to report to work up to thirty (30) minutes before the start of their scheduled shifts and were allegedly not paid for this time. (Solsol Dep. at p. 119: 3-8, Ex. 10; Rodriguez Dep. at pp. 39-41, Ex. 11.) Other janitors' claims are entirely different. For example, some opt-ins claimed that they punched in between 5 and 10 minutes before the start of the shift and gathered supplies and equipment and went to work.[4] Others claimed to punch-in up to 30 to 40 minutes before the shift,[5] and others claimed to punch-in 15 to 20 minutes early.[6] Some have not claimed any pre-shift time.[7] Yet another group has claimed an unspecified amount of pre-shift time stating simply that they would punch-in early or start collecting supplies before the start of the shift.[8] Further, some of the janitors claim that they performed pre-shift work before punching-in.[9]

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[4] *See, e.g.,* Declarations of Miguel Aguiniga-Gonzalez (Doc. #422-1 at p. 1), Olivia Almaraz (Doc #422-1 at p. 3), Frederick Allen (Doc #422-1 at p. 5); Nicolas Morales Barcenas (Doc. #422-1 at p. 14);Bernalisse Castellanos (Doc # 422-1 at p. 21); Marina Elena Paniagua De Cortes (Doc #422-1 at p. 25); Emily Naquin (Doc #422-1 at p. 54); Omar Robles (Doc #422-1 at p. 62).

[5] *See, e.g.,* Declarations of Jorge Angeles (Doc. #422-1 at p. 9); Alina Bozecka (Doc. #422-1 at p. 16); Bridgette Gunn (Doc #422-1 at p. 41); Phillip Jordan (Doc #422-1 at p. 43); Krystina Kosiba (Doc #422-1 at p. 45); Jules Roldan (Doc #422-1 at p. 64); Michael Seidler (Doc #422-1 at p. 66); Francisco Adino (Doc #431-1 at p. 1).

[6] *See e.g.,* Declarations of Martha Arroyo (Doc # 422-1 at p. 12); Helena Brzezinski (Doc #422-1 at p. 18); Emeterio Cortes (Doc #422-1 at p. 23); Ruperto Cortes (Doc #422-1 at p. 27); Cesar Diaz (Doc #422-1 at p. 30); Jaime Galarza (Doc # 422-1 at p. 35); Joanna Kramarz (Doc #422-1 at p. 47); Xiomara Pastoriza (Doc #431-1 at p. 5).

[7] *See e.g.,* Declarations of Bogosia Buss (Doc #422-1 at p. 20); Joe Diaz (Doc #422-1 at p. 32).

The Plaintiffs' claims related to working during the unpaid meal period are similarly disparate. Some claim that they worked every day through the entire thirty minute meal period, or nearly the entire meal period.[10] Others claim to have worked through part of the meal period on most days or every day.[11] Others claim to have worked through all or part of the meal period either a couple of days per week or occasionally.[12]

Attached as Defendants' Exhibit 14 is the Declaration of Sally Coady ("Coady"), who is Scrub's payroll processor. Coady reviewed all of the opt-in consent forms filed in this case and found that many of the employees worked for Scrub over varying time periods. (*Id.* ¶¶ 2-3.) Some of the opt-ins worked for Scrub less than one week, and others worked for Scrub for only one or two days. (Exhibit 1 to Coady Declaration.) The hourly rates for these employees also varied with City project janitors paid under the terms of the CBA, cabin cleaners paid at a higher hourly rate, and employees paid different rates at different times. (*See* Sample Payroll Registers at Exhibit B to Defendants' Exhibit 14.)

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[8] *See, e.g.,* Declarations of Antjuan Brown (Doc #418-1 at p. 2); Andre Elrod (Doc #418-1 at p. 6); Deborah English (Doc #418 at p. 7); Marek Gurga (Doc # 418-1 at p. 8); Scottie Hays (Doc #418-1 at p. 9); Jose Bernal (Doc #417-1 at p.6); Maria Betancourt (Doc #417-1 at p. 7).

[9] *See, e.g.,* Declarations of April Dudley ¶ 7 (Doc #422-1 at p. 33); Nieves Gollena ¶ 6 (Doc #422-1 at p. 39); Francine Lomaz ¶¶ 4, 6 (Doc #422-1 at p. 49).

[10] *See, e.g.,* Declarations of Christian Bracero ¶ 10 (Doc #424-1 at pp. 3-4); Tatiana Chavez ¶ 10 (Doc #424-1 at pp. 5-6); Tianna Barber ¶ 4 (Doc #421-1 at p. 5).

[11] *See, e.g.,* Declarations of Alma Aguiniga (Doc #431-1 at p. 3); Xiomara Pastoriza (Doc #431-1 at p. 6); Tatiana Chavez (Doc #424-1 at pp. 5-6); Miguel Anguina-Gonzalez ¶ 9 (Doc #422-1 at pp. 1-2); Brittnee Bannister ¶ 10 (Doc #424-1 at pp. 1-2).

[12] *See e.g.,* Declarations of Carlos Torres ¶ 8 (Doc #422-1 at p. 68); Bernadette Yarbrough ¶ 8 (Doc #422-1 at p. 72).

III. APPLICABLE LEGAL STANDARD

The majority of courts have adopted a two-step process for determining whether a Federal Labor Standards Act ("FLSA") lawsuit should proceed as a collective action. *Strait v. Belcan Engineering Group,* 911 F.Supp.2d 709, 718 (N.D. Ill. 2012) (citations omitted). At the first stage, a named plaintiff can move for conditional certification by making a modest factual showing that the named plaintiff is similarly situated to other employees. *Heckler v. DK Funding, LLC,* 502 F.Supp.2d 777, 779 (N.D. Ill. 2007). The standards for conditional approval are "lenient" and typically result in conditional certification. *Smith v. Family Video Movie Club, Inc.,* 2015 WL 1542649, at *3 (N.D. Ill., March 31, 2015) (citations omitted). In its April 27, 2015 Order, the Court previously found that Plaintiffs made this modest showing, conditionally certifying a class. (Doc. #339.)

"At the second stage, however, the court's inquiry becomes more stringent." *Strait,* 911 F.Supp.2d at 718 *citing Franks v. MKM Oil, Inc.,* 2012 WL 3903782, at *9 (N.D. Ill., Sept. 7, 2012). "The second stage analysis requires the court to employ a much stricter standard in making a final determination on the similarly situated question considering a number of factors including the disparate factual and employment settings of the individual plaintiffs and the defenses available to defendants that are individual to each plaintiff." *Strait,* 911 F.Supp.2d at 718 *quoting AON Corp. Wage & Hour Employment Practices Litig.,* 2010 WL 1433314, at *5 (N.D. Ill., April 8, 2010). At the second stage, the court considers: "(1) whether the plaintiffs share similar or disparate factual and employment settings; (2) whether the various affirmative defenses available to the defendant would have to be individually applied to each plaintiff; and (3) fairness and procedural concerns." *Id.*

The Seventh Circuit has recognized the similarity between Rule 23 and Section 216(b) analyses in certification of a class. *See Espenscheid v. DirectSat USA, LLC,* 705 F.3d 770, 772 (7th Cir.2013) (noting that "there isn't a good reason to have different standards for the certification of the two types of action, and the case law has largely merged the standards, though with some terminological differences."). "Consequently, while analyzing decertification under FLSA precedent, the Court can look to Rule 23 for additional guidance." *Smith v. Family Video Movie Club, Inc.,* 2015 WL 1542649, at * 3 (N.D. Ill., March 31, 2015).

IV. ARGUMENT

There are disparate facts and numerous dissimilarities between the job duties, work schedules, timekeeping practices and alleged off-the-clock work between the named Plaintiffs, Solsol and Rodriguez, and the members of the proposed class such that individual issues predominate over any alleged similarities. The named Plaintiffs worked on the City project, while numerous other employees worked on different projects performing different jobs, such as cabin cleaning, jet bridge cleaning, hangar cleaning and provisions. The employees claim different time spent on pre-shift work with some, such as Rodriguez and Solsol, claiming that they were required to report up to thirty minutes before the start of their scheduled shift, while others, including cabin cleaners, claiming they performed work filling spray bottles which only took a minute. The same variations apply to meal period time where some employees claim they would occasionally be interrupted to perform work, and others state that they never received a full thirty minute meal period but were docked for thirty minutes every day. There are too many variations in the work performed, the time keeping practices, and the alleged pre-shift and meal time work of employees to support certification of a class in this case.

In addition, Defendants' Affirmative Defenses will necessarily apply to each individual opt-in Plaintiff. For example, the records demonstrate that some of the opt-in Plaintiffs were overpaid for time they did not actually work. Individual determinations need to be made as to those Plaintiffs. In addition, many of the opt-in Plaintiffs stated in depositions that they performed one or two minutes of pre-shift work, which is *de minimis* and not recoverable. Some supervisors, such as Garcia and Nikolova, stated that they would round time to the nearest quarter hour, which complies with applicable Department of Labor ("DOL") regulations and supports Scrub's good faith belief that their time keeping practices were lawful. As such, the individualized application of Scrub's Affirmative Defenses does not favor maintaining this case as a class action.

Finally, procedural and fairness concerns weigh in favor of decertification of the class. Importantly, there is no common method for calculating the alleged damages in this case. Many opt-ins worked for very short periods of time, as little as one or two days, and would be entitled to minimal, if any, recovery, while others worked for longer periods. Many employees claim to have worked a few minutes before the start of the shift and occasionally had their meal period interrupted, while others claim they punched in up to thirty minutes early or never received a full lunch period. Plaintiffs have not identified any damages expert and have no reliable method for estimating damages over such a disparate class. There is simply no way to calculate damages in this case other than to conduct over 760 mini-trials. Accordingly, the class should be decertified.

A. Plaintiffs are Not Similarly Situated and Highly Individualized Inquiries Are Necessary to Establish Liability and Damages.

"Plaintiffs bear the burden of demonstrating that they are similarly situated." *Strait,* 911 F.Supp.2d at 918 *citing Medina v. Happy's Pizza Franchise, LLC,* 2012 WL 1094353, at *2 (N.D. Ill., April 2, 2012) and *Russell v. Illinois Bell Tel. Co., Inc.,* 721 F.Supp.2d 804, 811 (N.D.

Ill. 2010). It is an "essential condition of maintaining an FLSA class action" that "the members of the class be similarly situated to one another." *Jonites v. Exelon Corp.*, 522 F.3d 721, 726 (7th Cir. 2008); *see also Leahy v. City of Chicago,* 96 F.3d 228, 232 (7th Cir. 1996).

1. Individualized Issues Predominate as to Liability

"To proceed as a collective action, Plaintiffs must demonstrate similarity amount the situations of each plaintiff beyond simply claiming that the FLSA has been violated; an identifiable factual nexus that binds the plaintiffs together as victims of a particular violation of the overtime laws must be present." *Strait v. Belcan Engineering Group, Inc.*, 911 F.Supp.2d 709, 722-23 (N.D. Ill. 2012) (citations omitted). "A collective action is not appropriate when determining whether a plaintiff has a viable claim requires a detailed, fact-specific inquiry." *Id.* at 723 *citing Alvarez v. City of Chicago,* 605 F.3d 445, 449 (7th Cir. 2010). In analyzing the plaintiffs' factual and employment settings, "courts typically consider such factors as location, job duties, supervision, and policies or practices that bind plaintiffs' claims together." *Strait,* 911 F.Supp.2d at 723 (citations omitted).

Janitors who worked on the City project, such as Solsol and Rodriguez, are not similarly situated to Scrub employees who worked cleaning the airline gates and jet bridges, or to cabin cleaners who cleaned the inside of airplanes during the day, or to those cabin cleaners who worked the night shift, or to those employees who worked in the hangars or in provisions. Each of these categories of Scrub employees had different tasks at different locations under different supervisors with different time keeping practices.

Some of the janitors on the City project claim that they were required to report to work early to gather supplies. Rodriguez, who worked on the second shift, claimed that her supervisors wanted her to report up to thirty minutes early. (Rodriguez Dep. at pp. 29, 31, 39, Ex.

11.) Other janitors on other shifts claimed to have reported a few minutes early to gather supplies. (*See* note 4 *supra*.)

By contrast, cabin cleaners may have punched in early, but were not required to perform any pre-shift tasks, or any time spent performing pre-shift tasks was *de minimis*. Some cabin cleaners claim to have spent only a minute filling a spray bottle for her shift. (*See* Duckins Dep. at p. 72: 7-13, Ex. 7; Arroyo Dep. at p. 68, Ex. 8.) Some cabin cleaners claim that they would punch-in early, but would spend time socializing and playing games on their phone. (Arroyo Dep. at pp.63-64, Ex. 8.) Many supplies for cabin cleaners for the international airlines were on a truck outside. (Garcia at pp. 122:1 – 125:6, Ex. 1.). These supplies were gathered after the start of the shift. (*Id.*)

Employees who worked at the hangar, such as Cortes, took a shuttle to the hangar, punched-in at provisions and then gathered supplies from a janitor's closet and start work. (Cortes Dep. at pp. 39-40, 60-62, Ex. 13.) There is no evidence that employees in provisions performed any pre-shift work.

Moreover, some opt-ins claim that their supervisors started exercises prior to the start of the scheduled shift, while others claim that their supervisors started exercises at the start of the scheduled shift. Cortes stated that she never performed exercises while working at Hangar 5. (Cortes Dep. at p. 55, Ex. 13.)

All hourly employees at Scrub are given a thirty (30) minute unpaid meal break. For the unpaid meal period, cabin cleaners may have been given up to 40-45 minutes to travel to the break room, eat their meal, and return to their assigned location. (Nikolova Dep. at pp. 118-119, Ex. 5.) Some janitors claim to have spent 5-10 minutes, while others claim to have spent the entire time working through the meal period. (*See* notes 10-12, *supra*.)

"Determining factual similarity for certification is not done simply by counting noses but requires a qualitative assessment too; it is not bean counting." *Smith v. Family Video Movie Club, Inc.,* 2015 WL 1542649, at *7 (N.D. Ill., March 31, 2015). The variations in work performed, supervisor practices, and time spent by each the putative class members require individualized inquires for each employee depending on his/her department, shift, the tasks performed and the practices of the particular supervisor. There is no uniformity among the class members as to the amount of pre-shift time allegedly worked or the amount and frequency of meal period time allegedly worked. Alleged liability cannot be determined on a class wide basis. *See Jonites,* 522 F.3d at 725-26 (denying certification of a collective action that was "hopelessly heterogeneous" based on different meal period practices); *Camilotes v. Resurrection Health Care Corp.,* 286 F.R.D. 339, 346 (N.D. Ill. 2012) (holding that too many factual disparities existed for a collective action); *Elder v. Comcast Corp.,* 2015 WL 3475968, at *10 (N.D. Ill. June 1, 2015) ("In light of the variation in instructions from more than 250 supervisors, and the variation in the frequency, nature, and duration of the lunch break interruptions, Plaintiffs have not established by a preponderance of the evidence that any common questions central to their meal break claim could be resolved on a classwide basis."). As a result, Plaintiffs' putative class should be decertified.

2. Damages Determinations Require Individualized Inquiries.

It is impossible to determine whether a member of the putative class has a claim for damages, or the value of the claim, without an individualized, week-by-week inquiry into whether the specific class member performed work off the clock, what was done, which workweek it was done, how much time was spent on the work, and the hourly rate of pay for the class member. Plaintiffs have not identified any damages expert and have not provided any reliable sampling method to measure damages on a class wide basis. Indeed, a review of a sample of supervisor time sheets used for payroll shows that many employees worked far less than forty (40) hours in some weeks, while others, especially cabin cleaners, often worked over forty (40) hours during a work week. (*See* Defendants' Exhibit 6.) Similar to the plaintiffs in *Espenscheid*, there is no method for extrapolating an accurate sample from the variations inherent in the over 760 members of the putative class. 705 F.3d 770, 774-75 (7th Cir. 2013).

Plaintiffs will undoubtedly point to an alleged common policy of deducting 30 minutes for meal periods of every hourly employee. Yet, "an automatic deduction policy, in and of itself, does not violate the FLSA." *Camilotes v. Resurrection Health Care Corp.*, 286 F.R.D. 339, 350 (N.D. Ill. 2012) (citations omitted).

In *Camilotes,* the plaintiffs asserted that the defendant's system-wide policy of deducting 30 minutes for meal periods caused FLSA violations. *Id.* at 351. Yet, the court held that such a policy did not support certification of a collective action when there was wide variation in circumstances of alleged violations of the policy. *Id.* The court noted "even though the proposed class in this case is comprised of all nurses, Defendants have established significant factual differences among the departments with respect to when the nurses are able to take their meal breaks and under what circumstances. . . ." *Id. citing Blaney v. Charlotte-Mecklenburg Hosp. Auth.,* 2011 WL 4351631 (W.D.N.C. Sept. 16, 2011) (other citations omitted).

Similarly, here, members of the putative class include cabin cleaners who may have the meal period interrupted to clean a plane that just arrived, or janitors on the City project who claim they did not receive enough time to walk to the break room to enjoy a full thirty minute meal period, and other janitors who claim they never received a meal period and others, such as Cortes when working in Terminal 1, who claim they did get a full meal period (*See* Cortes Dep.

at p. 70: 10-13, Ex. 13). Such diverse circumstances require individual determinations for each opt-in Plaintiff and do not support class certification.

The opt-ins who claim to have performed off-the-clock did so for varying amounts of time and varying frequency. The opt-ins were paid different hourly rates and worked varying amounts of time each week. There is no proposed sample by Plaintiffs and no damages expert identified by Plaintiffs for any reliable method for determining alleged damages. Thus, over 760 individual mini-trials will need to be conducted to determine whether each opt-in can establish liability and, if so, the extent of each individual's alleged damages.

When, as here, Plaintiffs have failed to show that "sampling methods used in statistical analysis were employed to create a random sample of class members", individual issues will predominate rendering class certification inappropriate. *Espensheid,* 705 F.3d at 774. The class in this case should be decertified.

B. The Court Must Apply Scrub's Affirmative Defenses to Each Plaintiff.

Under the second factor described above, courts consider "whether the various affirmative defenses available to the defendant would have to be individually applied to each plaintiff." *Strait,* 911 F.Supp.2d at 718. This factor supports decertification when "[t]he defense as to each Plaintiff would require consideration of different facts and individualized testimony that is unique to each Plaintiff and could not be generalized among the . . . Plaintiffs." *Camilotes,* 286 F.R.D. at 352 *quoting Kuznyetsov v. West Penn Allegheny Health Sys.,* 2011 WL 6372852 (W.D. Pa. Dec. 20, 2011).

Several of Defendants' Affirmative Defenses must be applied individually to each of the opt-in Plaintiffs. Specifically, some of the opt-in Plaintiffs were actually overpaid for work performed. As a result, Scrub is entitled to a setoff as to these amounts. (See Affirmative

Defenses ¶ 1, Doc #448.) This defense will require individualized determinations as to each opt-in Plaintiff whether a set-off applies and how much of a set-off applies.

In addition, Defendants have alleged that claims of the putative class members are barred because at least some of the activities for which they demand compensation are *de minimis* under the FLSA and are not compensable. *See Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 692 (1946) ("A few seconds or minutes of work beyond the scheduled working hours . . . may be disregarded."). Many of the opt-in Plaintiffs who were cabin cleaners stated that they would spend merely "a minute" to fill a spray bottle (Arroyo Dep. at p. 68, Ex. 8; Duckins Dep. at p. 72, Ex. 7). Others claim to have punched in as little as five to ten minutes early. (*See* note 4, *supra.*) Thus, an individual determination must be made for each opt-in Plaintiff who punched in five or ten minutes before the start of the scheduled shift of the work is *de minimis*, properly rounded or compensable. Without such an inquiry, some opt-ins who punched in only five minutes early could receive a windfall based on other opt-ins who claim to have punched-in 15, 20 or 30 minutes early.

Similarly, there is a wide variety of claims regarding how much particular opt-in Plaintiffs allege to have worked through their unpaid meal periods. (See notes 10-12, *supra.*) If an employee missed merely a couple of minutes, such time is *de minimis*. *See Lindow v. U.S.,* 738 F.2d 1057, 1062 (9th Cir. 1984) ("Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable." (citing cases)).

In addition, supervisors had discretion as to whether a meal break needed to be missed, or not, and whether an employee who missed part or all of a meal period would be allowed to make up the time or be compensated. An individual inquiry must be made as any time worked through a particular meal period to determine how much time was worked and whether the time is *de minimis* or not.

Some cabin cleaner supervisors stated that they would round to the nearest quarter hour both when an employee punched in early and when they punched in late. (*See, e.g.,* Garcia Dep. at pp. 82, 89, Ex.1; Nikolova Dep. at pp. 129-130, Ex. 5.) This is a permissible practice under applicable regulations, 29 C.F.R. § 785.48(b), supporting Defendants' good faith affirmative defense. Pursuant to Section 785.48(b), rounding to the nearest quarter hour is acceptable. As such, individual determinations will need to be made in order to decide whether such rounding complied with applicable regulations as to each particular class member who had time rounded.

Defendants' Affirmative Defenses must be applied on an individual basis. Therefore, the second factor favors decertification of the collective action in this case.

C. Fairness and Procedural Concerns of Nearly 770 Mini-Trials Weighs Heavily Against Class Certification.

To analyze fairness and procedural concerns, "the Court must determine whether it can manage the collective action in a manner that does not cause prejudice to any party." *Smith v. Family Video Movie Club, Inc.,* 2015 WL 1542649, at *8 (N.D. Ill., March 31, 2015).

As noted above, Plaintiffs have not presented any reliable method to determine liability or damages on a class wide basis. Plaintiffs have offered no expert on damages, and no reliable method at all of calculating damages on a class-wide basis.

Plaintiffs suggest bifurcation of liability and damages in this case. However, such a process will not avoid the need to conduct over 760 mini-trials to determine the amount of off-the-clock work each opt-in allegedly performed and how much each such opt-in is allegedly entitled to in damages. For instance, opt-in Plaintiff, Matthew Garcia, worked for Scrub for three days from June 21 until June 24, 2013. His purported damages are minimal compared to other class members, such as Kartina Duckins, who worked from prior to the start of the class period in October 2010 through July 18, 2013. (Exhibit 1 to Coady Dec. at line nos. 208 & 172, Ex. 14.) Further, janitors who worked for Scrub on the City contract in 2011-2012 were paid a lower hourly rate than other janitors and cabin cleaners who were paid still higher rates. (Ex. 15.) It is not possible to determine any reasonably accurate assessment of damages on a class-wide basis in this case.

There is no reliable method for certification of sub-classes either. Based on their own sworn Declarations, the opt-in plaintiffs in each of the various potential sub-classes claim to have worked different amounts of pre-shift and meal period time requiring individual determinations within the potential sub-classes. (*See* notes 4-12, *supra.*) Some janitors in the same potential sub-class, terminal janitors for instance, claim 30 minutes of pre-shift time every day[13], while others claim 15 minutes[14], and still others who claim 5 to 10 minutes[15]. The same individual inquiries would be required for alleged uncompensated meal period work for janitors within the same potential sub-class.

In addition, the named Plaintiffs, Solsol and Rodriguez, both janitors on the City project which ended on December 31, 2012, have no connection with and do not represent the diverse members of the putative class. The putative class includes a wide variety of positions completely different from the jobs performed by Solsol and Rodriguez. The work performed by cabin cleaners and hangar cleaners and those in provisions, and the circumstances under which work was performed, is different from work performed by Solsol and Rodriguez. The named Plaintiffs are, therefore, not representative of the putative class.

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[13] *See, e.g.,* Declaration of Michael Seidler ¶¶ 5-6 (Doc #422-1 at p. 66).
[14] *See, e.g.,* Declaration of Scott Trice ¶ 6 (Doc #422-1 at p. 71).
[15] *See e.g.,* Declaration of Deanna Williams ¶¶ 5-6 (Doc #422-1 at p. 74).

As a result, procedural and fairness concerns weigh decidedly against certification of the putative class. Defendants' Motion for Decertification of the putative class should be granted.

V. CONCLUSION

Plaintiffs have presented no reliable method to assess class-wide damages among the various and disparate members of the putative class in this case. The putative class includes employees who worked in different departments for different lengths of time with different rates of pay and who allegedly performed varying amounts of pre-shift or meal period work under supervisors with varying methods of recording time. The opt-in plaintiffs have provided widely different statements about how much pre-shift time was worked, and whether, how often and how long they worked through the unpaid meal period, if at all. Individualized issues predominate over any alleged issues common to the putative class. The claims of Solsol and Rodriguez are not representative of members of the broad class. As a result, the proposed class in this case should be decertified, with the opt-in Plaintiffs being dismissed, and the case should proceed on the merits of Solsol and Rodiguez's individual claims.

WHEREFORE, Defendants, Scrub, Inc. , Teresa Kaminska, and Mark Rathke (collectively "Defendants"), respectfully request that this Honorable Court enter an Order granting Defendants' Motion to Decertify the Class and decertifying the conditionally certified collective action, and granting further relief which the Court deems just and proper.

Dated: November 9, 2016

Respectfully Submitted,

SCRUB, INC., TERESA KAMINSKA
AND MARK RATHKE

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